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I. INTRODUCTION

Law has a notably respectable place in liberal political theory. Everyone agrees that the "rule of law" is one of the core principles of liberal constitutionalism. Here, it is said, we enjoy a "government of laws, and not of men."[1]

But why do liberals, as a rule, share this respect, even reverence, for law? The rule of law need not be so honored; it has not been so honored in many (less liberal, but nevertheless respectable) times and places. Political theorists who are not liberals have rarely bestowed upon the idea of law the privileged place it has always held for liberal political theorists, from Locke to Dworkin. So why is law so honored here, both in the ideas of liberal political theorists and in the practice of contemporary liberal democracies? What is so special about law for liberals?

It is my task here to discuss the place of political theory or political philosophy in legal scholarship. It is tempting to begin by emphasizing the gulf between justice and law: The job of political philosophers is to worry about justice; the job of lawyers is to worry about the law. Someone might say, then, to the lawyers and law professors: Justice is none of your business. (That is, it is none of your business *as lawyers*: We are all citizens too.) But this useful division of labor is perhaps not quite intelligible in the liberal polity, where it is so hard to think about justice without also thinking about the law. So we must begin this inquiry, it seems to me, with this superficial appearance: Law has an unusually proud place in the liberal understanding. Liberal political theory somehow teaches us

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1. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803); Cooper v. Aaron, 358 U.S. 1, 23 (1958); Morrison v. Olson, 487 U.S. 654, 697 (1988).

that law and justice are inextricably bound, and so it might seem to authorize lawyers to become political philosophers. What's wrong with that?

The philosophical question—"What is the nature of law in liberal society?"—is theoretically prior to the question of scholarship that is our theme here. *Our* question—"What ought to be the place of humane or liberal studies, including political philosophy, in legal scholarship?"—cannot be answered well without thinking first about a series of more fundamental questions of political philosophy: What is law? What is the meaning of the idea of "the rule of law," lately so much in traffic? What is the place of law in liberal society in particular, where the first aim of political life is to secure the blessings of liberty?

Suppose, for example, that one judges liberal political theory to be an apology for privilege, prejudice, or illegitimate power. And suppose that one believes that liberal political institutions are masks, having the effect and perhaps the purpose of sustaining wicked privilege, and crushing the worthy aspirations of the marginalized, the disadvantaged, the weak. Then the idea of the rule of law would itself be suspect: It would seem to be a tool of oppression, its pretended neutrality an insult that, once noticed, would make the injury the more intolerable.[2] The business of the law professor would then be indistinguishable from the business of the humane student of politics generally: The most urgent task would be to transform or perhaps to destroy liberal institutions (not least to undermine liberal apologetics about the rule of law); legal scholarship (like political theory and literary criticism) would have to become politicized, engaged, a weapon in the war against liberal injustice. And the rules of academic etiquette—the good manners of professors that mark disciplinary boundaries and spheres of professional competence, that establish standards of what counts as doing political philosophy or legal reasoning, and that provide for the informal enforcement of these norms—would themselves seem to be instruments of a liberal tyranny.[3] Such boundaries must be, as is sometimes said, "transgressed." If the law professor behaves herself and respects these boundaries and norms, does she not thereby confess that the liberal order within which such rules make sense—someone has to execute stock trades, someone has to make sense of the rules of evidence—is more or less reasonable, more or less just? By obeying

2. As Roberto Unger says, "a doctrinal practice that puts its hope in the contrast of legal reasoning to ideology, philosophy, and political prophecy ends up as a collection of makeshift apologies." ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 11 (1983).

3. *See id.* at 118-19.

the rules, she postpones the revolution.

Suppose, on the other hand, that one takes liberal political theory—as articulated, for example, in Rawls's *A Theory of Justice*[4]—to be the last word in political philosophy. Suppose, in other words, that one judges that we liberals have lately discovered the whole truth about justice. Only the footnotes remain. What then? In that case, too, one's philosophical views will likely determine one's views on the question regarding scholarship that is before us. If the principal business of liberal political philosophy is to teach citizens what their rights are, and if we now have a rigorous and certain knowledge of these rights, formerly unavailable, then surely it is the business of the law professor (in happy alliance with political philosophers and judges) to find a way to secure these rights in law. What good is the truth—what good is wisdom—if we cannot find a way to establish that truth as politically authoritative, to enable wisdom, if not the wise, to rule? And for that purpose, certainly, law professors are essential. They are the necessary link between philosophers and judges—between the impotent reasonings, the talk without arms, of political philosophers, and the potent reasonings of judges, who have a grasp on the collective force of the community but are unfortunately sometimes ill-informed about the latest developments in liberal political philosophy. So the law professor ought to concern himself with the business of achieving a "fusion of constitutional law and moral theory," on the basis of the "better philosophy [that] is now available,"[5] and spreading the good word to judges.

Now these are caricatures, of course. But the two opposing tendencies I describe are real forces in the contemporary academy, including the legal academy. These philosophical postures toward liberalism have, in fact, inspired modes of legal reasoning to suit them: Both postures authorize or even require lawyers to become political philosophers. That is why the question of legal scholarship is first of all a philosophical question. But both philosophical postures, and the modes of legal reasoning they inspire, seem to me dangerous. It is my task in this essay to say why, and to sketch a sounder way of thinking about liberal politics, one that also has this consequence: Law professors should learn again to mind their own business, to attend to the law and forget about justice.

In Part II, I present an interpretation of liberalism, closer in spirit to the liberalism of Locke and Montesquieu than to the liberalism of Rawls and Dworkin, that helps to explain the curious dignity of the

4. JOHN RAWLS, A THEORY OF JUSTICE (1971).
5. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 149 (1st. ed. 1977).

idea of the rule of law in liberal political theory. I argue that classical liberalism aims above all to remedy our natural human condition of insecurity, and that it succeeds in part by subordinating the quest for justice to the rule of law. Thus, for example, the classical liberal argues that procedural principles of equality (above all, the Lockean principle of consent) trump substantive principles of equality (such as Dworkin's "principle of equal concern and respect"[6]).

In Part III, I argue that liberal justice is not merely procedural: Liberal justice is not obedience to law simply, it is *reasonable* obedience to laws that respect the natural *equality* of human beings. But I argue that these higher reaches of liberal justice belong to the spheres of liberal statesmanship and liberal political philosophy, not liberal law. And I argue that it is not the task of lawyers *as lawyers* to educate the public mind regarding these higher demands of justice. This is properly a task for citizens and statesmen, some of whom may happen to be political philosophers or lawyers.

In Part IV, I return to the question of scholarship regarding the relation between political philosophy and legal reasoning with which I began. I argue that the line between these modes of thinking in contemporary legal scholarship is often blurry and indistinct. After examining Dworkin's argument that legal reasoning is inescapably philosophical, I argue that this now common sense of the matter is mistaken. I conclude that the liberal polity is best served by preserving a rather strict division of labor between philosophers and lawyers.

II. LIBERTY, SECURITY, AND THE RULE OF LAW

Let me begin by presenting an account of liberalism that will help, I think, to explain the otherwise curious dignity of the idea of law in liberal political theory. Classical liberalism is the view that liberty is the fundamental political good because it is the most certain means to peace among natural foes who must learn to live together as civil friends.[7] I acknowledge that this account of liberalism is somewhat old-fashioned, more Lockean than Rawlsian, and that to some it will seem to be a caricature. To such doubts, I say, perhaps there is more to liberalism, but this hard truth is the (often forgotten) foundation of liberalism.[8]

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6. RONALD DWORKIN, A MATTER OF PRINCIPLE 191 (1985).

7. The authoritative statement of this view is JOHN LOCKE, TWO TREATISES OF GOVERNMENT 267–85, 323–53 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). On Locke's liberalism, see THOMAS L. PANGLE, THE SPIRIT OF MODERN REPUBLICANISM (1988); and NATHAN TARCOV, LOCKE'S EDUCATION FOR LIBERTY (1984).

8. Of course, I do not here present a full account of the differences between the classical liberalism of Locke and Montesquieu and the new liberalism of Rawls and Dworkin. Here, I

Liberalism strictly speaking is the doctrine that *liberty* is *the* fundamental political good. Where there is no liberty, all other political goods—justice, virtue, prosperity, equality—are quite beyond our reach. And what is liberty? Here is the original understanding of liberty: "[P]olitical liberty," says Montesquieu, "is that tranquillity of spirit which comes from the opinion each citizen has of his security and in order for him to have this liberty the government must be such that one citizen cannot fear another citizen."[9] *That* is liberty: *One citizen must not fear another citizen.*

And this is so whether that other citizen is a ruler or a common thief. "The Injury and the Crime is equal," says Locke, "whether committed by the wearer of a Crown, or some petty Villain."[10] "Should a Robber break into my House, and with a Dagger at my Throat, make me seal Deeds to convey my Estate unto him, would this give him any Title?"[11] Surely not. But,

> the Title of the Offender, and the Number of his Followers make no difference in the Offence, unless it be to aggravate it. The only difference is, Great Robbers punish little ones, to keep them in their Obedience, but the great ones are rewarded with Laurels and Triumphs, because they are too big for the weak hands of Justice in this World, and have the power in their own possession, which should punish Offenders.[12]

And so the first task of the liberal polity is to secure citizens against robbers, both petty and great—that is, against the mugger on the

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focus on one particular ground of dispute between the old liberals and the new: the question of the relation between the rule of law and philosophy. This difference, I argue, has its roots in a difference regarding the end of liberalism: Is the end of liberalism "security" (as Locke and Montesquieu argue) or "equal concern and respect" (in Dworkin's formulation)? Various contemporary statements of the case for the sort of liberalism described in the text can be found in STEVEN KAUTZ, LIBERALISM AND COMMUNITY (1995); PATRICK NEAL, LIBERALISM AND ITS DISCONTENTS (1997) (arguing for "vulgar" or "Hobbesian" liberalism against both "comprehensive" liberalism and "political" liberalism); and Judith N. Shklar, *The Liberalism of Fear*, *in* LIBERALISM AND THE MORAL LIFE (Nancy L. Rosenblum ed., 1989) (arguing that liberalism is founded above all on a fear of political cruelty). *See also* HARVEY C. MANSFIELD, JR., THE SPIRIT OF LIBERALISM (1978). Liberal legal theorists today almost invariably defend a species of Rawlsian liberalism, but this is no longer true among liberal political theorists more generally. One aim of this paper is to argue that a recovery of the classical understanding of liberalism would require liberal legal theorists to adopt a less philosophical mode of legal reasoning. I argue that the classical understanding of liberalism makes greater sense of the respect for the rule of law that characterizes liberal political philosophy than does Rawlsian liberalism, and further that it teaches liberal political philosophers and legal theorists that in important respects law trumps "justice."

9. CHARLES-LOUIS DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 157 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748). The account of liberalism in the text begins from Locke, Montesquieu, and Madison, because these political philosophers are the founders of the liberalism of security or tranquility that is presented here as an alternative to the more conventional liberalism of equal concern and respect.

10. LOCKE, *supra* note 7, at 385.

11. *Id.*

12. *Id.* at 385–86.

dark city street corner and against the tyrant, who sometimes comes in numbers (the "tyranny of the majority") and who would strike at our lives and liberties under color of law. Thus both the law-and-order conservative and the civil libertarian have essential and respectable places in the liberal polity, each with a task that will be from time to time more urgent than the other's. First, defeat the (lawless) petty criminal; then restrain the (lawless) tyrannical magistrate. One citizen must not fear another citizen: That is liberty. The whole architecture of the liberal state is built on this low but solid foundation. All of the familiar institutions and principles of the liberal state were designed, one way or another, to secure us against robbers, petty and great.

Here I will describe five of the most fundamental liberal principles and institutions, each of which arose principally from a concern for security or tranquility. First, for the sake of liberty understood as security, and recognizing with the authors of *The Federalist* that in a republican political community the principal threat to security would come from majority factions undertaking schemes of oppression, liberals established a limited government founded on the so-called new "science of politics."[13] This new science was discovered by "enlightened friends to liberty"[14] as a remedy for the ills of popular governments, which "have ever been found incompatible with personal security or the rights of property."[15] Thus, the familiar institutions established in the Constitution and defended in *The Federalist*: separation of powers and checks and balances; representation and "*the total exclusion of the people in their collective capacity*" from any share in government; an independent judiciary; the large commercial republic; and federalism.[16]

Second, for the sake, once again, of liberty understood as security, and recognizing with Montesquieu that our "security is never more attacked than by public or private accusations,"[17] liberals established

13. THE FEDERALIST NO. 9, at 119 (Hamilton) (Isaac Kramnick ed., 1987).

14. *Id.*

15. THE FEDERALIST NO. 10, at 126 (Madison) (Isaac Kramnick ed., 1987).

16. THE FEDERALIST NO. 63, at 373 (Madison) (Isaac Kramnick ed., 1987). For a debate between an old liberal and a new one on questions of liberal constitutionalism, see Robert H. Dahl, *On Removing Certain Impediments to Democracy in the United States*, *in* THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC 230 (Robert H. Horwitz ed., 1986); and James W. Ceaser, *In Defense of Republican Constitutionalism: A Reply to Dahl*, *in* THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC, *supra*, at 253. *Compare* ROBERT DAHL, DEMOCRACY AND ITS CRITICS 312 (1989) (arguing for changes in constitutional structure to "help make political life more democratic" than it now is in liberal constitutional states), *with* HARVEY C. MANSFIELD, JR., AMERICA'S CONSTITUTIONAL SOUL at ix (1991) (defending a liberal or "constitutional view of American politics" against the "increasing democratism of our politics").

17. MONTESQUIEU, *supra* note 9, at 188. For a new liberal account of the differences between old and new liberals on these questions of criminal law, see DWORKIN, *supra* note 6,

an independent judiciary and authorized that judiciary to secure the rights of the accused against tyrannical magistrates. And liberals even embraced a conception of the criminal law that on the whole reflects Montesquieu's judgment that the only true crimes are crimes against private security and crimes against public tranquility: There are no crimes, strictly speaking, against religion or against mores, because to punish such crimes "destroys the liberty of citizens by arming against them the zeal" of the righteous and the pure.[18]

Third, for the sake of liberty understood as security, and recognizing that, as Madison says in his *Memorial and Remonstrance*, "torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinions," liberals established religious freedom, in an effort to destroy the "malignant influence [of religious discord] on the health and prosperity of the State."[19] Like Locke and Hobbes, Madison knew that few ills compare to the "miseries, and horrible calamities, that accompany a Civill Warre."[20]

Fourth, for the sake of liberty understood as security, and recognizing with Locke that our natural condition is one of miserable poverty—hence insecurity—liberals established a large and robust commercial republic, founded on respect for rights of property and contract, in order to unleash human industry. Moreover, as the authors of *The Federalist* argue, the "most common and durable source of factions has been the various and unequal distribution of property."[21] As is well known, the large commercial republic is at the

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at 197-98, 200-01.

18. MONTESQUIEU, *supra* note 9, at 190.

19. James Madison, *Memorial and Remonstrance*, *in* THE MIND OF THE FOUNDER 11 (Marvin Meyers ed., Univ. Press New England 1981) (1785). For a classical liberal discussion of religious liberty, see WALTER BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY (1976); and WALTER BERNS, *The Importance of Being Amish*, *in* IN DEFENSE OF LIBERAL DEMOCRACY 299 (1984). For other liberal perspectives, see William Galston, *Two Concepts of Liberalism*, 105 ETHICS 516 (1995); Stephen Macedo, *Liberal Civic Education and Religious Fundamentalism: The Case of God v. John Rawls?*, 105 ETHICS 468 (1995); and Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990). Finally, see Richard Rorty, *The Priority of Democracy to Philosophy*, *in* THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM 257 (Merrill Peterson & Robert Vaughan eds., 1988) for a radically new liberal perspective on questions of religious liberty.

20. THOMAS HOBBES, LEVIATHAN 128 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651).

21. THE FEDERALIST NO. 10, at 124 (Madison) (Isaac Kramnick ed., 1987); *see also* LOCKE, *supra* note 7, at 285-302. For old and new liberal perspectives on rights of property, see DWORKIN, *supra* note 6, at 187, 192-96, 199; UNGER, *supra* note 2, at 57-88; Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls's Theory of Justice*, 121 U. PA. L. REV. 962 (1973); Marc F. Plattner, *American Democracy and the Acquisitive Spirit*, *in* HOW CAPITALISTIC IS THE CONSTITUTION? 1 (Robert A. Goldwin & William A. Schambra eds., 1982); and Marc F. Plattner, *The Welfare State v. the Redistributive State*, 55 PUBLIC INTEREST 28 (1979).

heart of the liberal strategy for taming the natural and enduring struggles between the rich and the poor. Beyond this, as Montesquieu argues, commerce "cures destructive prejudices" and "softens mores"[22]—and generally makes human beings gentler and more reasonable. For all of these reasons, promoting commerce and protecting rights of property are essential features of the liberal project of securing liberty.[23]

And fifth, for the sake of liberty understood as security, and recognizing with Montesquieu that no accusations are more threatening to the security of the individual than those that aim to punish thoughts or ideas—since, to say no more, such accusations admit of only the most imperfect sorts of proof and thus invite abuse—liberals have established freedom of speech and freedom of thought, including above all the rule that "speech becomes criminal only when it prepares, when it accompanies, or when it follows a criminal act."[24]

So what is the place of the "rule of law" in this liberal story? The principal root of the insecurity of human beings, which liberalism seeks to ameliorate, is the *lawlessness* of the most natural human passions—or, more precisely, *the inefficacy of the law of nature* in the state of nature, in the absence of a common power to secure obedience to law. The great task of liberal political theory and liberal statesmanship is to secure obedience to law, or to teach the reasonableness of obedience to law. Here is Hobbes's argument (but on this point, Locke certainly follows Hobbes): "[T]he passions that encline men to Peace, are Feare of Death; Desire of such things as are necessary to commodious living; and a Hope by their Industry to obtain them. And Reason suggesteth convenient Articles of Peace, upon which men may be called to agreement."[25] But it turns out, Hobbes continues, that the natural passions that incline human beings toward peace are weak and ineffective, for reasons that are familiar: Where there is "no visible Power to keep them in awe, and tye them by feare of punishment to the . . . observation of [the] Lawes of Nature," human beings will be tempted to pursue other goods, beyond security; "the miserable condition of Warre . . . is

22. *See* MONTESQUIEU, *supra* note 9, at 338.

23. *See id.* at 338-53.

24. *Id.* at 199. For a classical liberal account of freedom of speech, *see* WALTER BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY (1976). For another liberal view, see CASS SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993). For a new liberal account, see DWORKIN, *supra* note 6, at 335-72; CATHERINE MACKINNON, ONLY WORDS (1993); see also RONALD DWORKIN, *MacKinnon's Words*, *in* FREEDOM'S LAW 227 (1996) (discussing MacKinnon's *Only Words*).

25. HOBBES, *supra* note 20, at 90.

necessarily consequent . . . to the naturall Passions of men."[26] Indeed, "the Lawes of Nature (as *Justice, Equity, Modesty, Mercy,* and (in summe) *doing to others, as wee would be done to*) of themselves, without the terrour of some Power, to cause them to be observed, are contrary to our naturall Passions, that carry us to Partiality, Pride, Revenge, and the like."[27]

Perhaps the rule of law has pride of place in the liberal understanding because the fundamental problem of political life is to remedy the insecurity that follows inescapably from the natural lawlessness of human beings. If the end of political life is liberty understood as security, and if security is threatened above all by the natural lawlessness of human beings, then establishment of the rule of law will be the principal means to achieve the end of liberty. Consider Montesquieu's radical but precise formulation of the point: "Liberty is the right to do everything the laws permit; and if one citizen could do what they forbid, he would no longer have liberty because others would likewise have this same power."[28] On this account, liberty is mutual obedience to law—no more, no less.

Let's follow this classical liberal argument a little further. Locke agrees with Hobbes: The natural passions of human beings will drive us, in various ways, toward disobeying the Law of Nature, which would teach us "Peace, Good Will, Mutual Assistance, and Preservation," if we could attend to it.[29] But we cannot. And this is so, perversely, in spite of our natural desire for self-preservation and security, toward which obedience to the Law of Nature would surely tend. Consider, for example, the crucial problem of the executive power in the state of nature. Locke argues that, where there is no common power, every human being retains an equal right to punish violators of the Law of Nature.[30] This follows immediately from the natural equality of human beings: If anyone were to claim an exclusive executive power in the state of nature, he would thereby claim a natural right to rule; but no one is entitled to rule by nature, since we are by nature equals. Yet this arrangement of the executive power, the power to punish those who violate the Law of Nature, ensures the inefficacy of the Law of Nature, Locke argues. Human beings who feel aggrieved will ordinarily "use a Criminal when he has got him in his hands, according to the passionate heats, or boundless extravagancy of his own Will," and not "as calm reason

26. *Id.* at 117.

27. *Id.* (emphasis in original). For Locke's perspective on the same issue, *see* LOCKE, *supra* note 7, at 269-82, 323-24.

28. MONTESQUIEU, *supra* note 9, at 155.

29. LOCKE, *supra* note 7, at 280.

30. *See id.* at 272, 275.

and conscience dictates."[31] That is, human beings will often neglect their best self-interest, misled by a blind self-love. Escalation is inevitable: My enemies will respond to the "passionate heats" and "boundless extravagancy" of my friends, who will respond in kind, and so on and on and on.[32] Thus, "*the State of War once begun, continues*," with no end in prospect.[33] Innocent bystanders who are neither friends nor enemies will prudently shy away from such quarrels: The inefficacy of any imaginable arrangement for neutral arbitration of disputes is perhaps the fundamental defect of the state of nature. Locke concludes: "*Civil Government* is the proper Remedy for the Inconveniences of the State of Nature, which must certainly be Great, where Men may be Judges in their own Case."[34] Civil government is first and fundamentally the *rule of law*: where men may not be judges in their own case; where there is government of laws, not of men. Law has an unusually distinguished place in the liberal understanding of politics above all because the natural lawlessness of the human passions is the principal threat to a civilized politics. The rule of law is the necessary remedy for this natural disorder.

More generally, to return to the problem of the inefficacy of the Law of Nature in the state of nature, the Law of Nature can be known only to its "Studiers,"[35] says Locke. Yet who has time to study in our ordinary state of penury and insecurity? More precisely, reason must be made to come to the aid of the liberal passions, for Locke as for Hobbes; but, for Locke as for Hobbes, human reason is too easily vanquished by ordinary passions and prejudices. Thus, when Locke surveys the nations of the world, he sees an extraordinary diversity of human institutions, but rather few pleasing spectacles and many follies and brutalities. He has "but little Reverence for the Practices which are in use and in credit amongst Men," he says, for these most often have their roots in the conceits of the passions and the imagination, bolstered over time by custom and authority—not in the calm reason that teaches a reasonable love of liberty.[36] This Lockean pessimism regarding the power of reason appears in a splendid passage from the *First Treatise*:

> Thus far can the busie mind of Man carry him to a Brutality below the level of Beasts, when he quits his reason, which places

31. *Id.* at 272.
32. *Id.*
33. *Id.* at 281 (emphasis in original).
34. *Id.* at 276 (emphasis in original).
35. *Id.* at 275.
36. *Id.* at 183.

> him almost equal to angels. Nor can it be otherwise in a Creature, whose thoughts are more than the Sands, and wider than the Ocean, where fancy and passion must needs run him into strange courses, if reason, which is his only Star and compass, be not that he steers by. The imagination is always restless and suggests variety of thoughts, and the will, reason being laid aside, is ready for every extravagant project; and in this State, he that goes farthest out of the way, is thought fittest to lead, and is sure of most followers: And when Fashion hath once Established, what Folly or craft began, Custom makes it Sacred, and 'twill be thought impudence or madness, to contradict or question it. He that will impartially survey the Nations of the World, will find so much of their Governments, Religions, and Manners brought in and continued amongst them by these means, that he will have but little Reverence for the Practices which are in use and credit amongst Men.[37]

There is little place for the reasonable love of liberty in this mad world, ruled as it is by imagination, fancy, passion, folly, craft, custom, religion, and not by reason: Indeed, perhaps the love of liberty will itself "be thought impudence or madness."

A politics of liberty can be achieved only at the end of this sorry history, when the (true) madness is evident to all. Only then can peaceful reason supply the defect of the peaceful passions by teaching human beings who have grown tired of endless war the necessity of the rule of law, limited government, self-restraint of political parties and religious sects, mutual respect for rights, and so on.

It would certainly be unreasonable, on this liberal view, to permit "reason" to rule directly—or, put otherwise, to submit to the rule of putatively wise rulers. Locke makes this clear in his account of the natural history of political communities (in Chapter VIII of the *Second Treatise*).[38] At first, says Locke, rulers were "Fathers" and then "Generals," apparently trustworthy elders who seemed wise and strong to our more innocent forebears. The view that government is by nature monarchical and that the wise and strong are entitled to rule is, so to speak, a natural confusion. But soon enough, these trusted rulers began to behave treacherously, motivated by "vain ambition," the wicked love of gain, and "evil Concupiscence," among other vices.[39] After this historical progress, "Men found it necessary to examine more carefully *the Original* and

37. *Id.* at 182-83.
38. *Id.* at 334-44.
39. *Id.* at 342.

Rights of *Government*; and to find out ways to *restrain the Exorbitances*, and *prevent the Abuses* of that Power which they having intrusted in another's hands only for their own good, they found was made use of to hurt them."[40] History teaches that government of men, however (seemingly) wise and trustworthy, must be replaced by government of laws.

This line of reasoning sheds further light on the honored place of the idea of law in liberal political theory. There is, after all, a respectable alternative to the rule of law. Aristotle asks in *The Politics*, for example, "whether it is more advantageous to be ruled by the best man or by the best laws."[41] He concludes—surprisingly, on the liberal view—that there is no certain answer to this question. On the one hand, "law is intellect without appetite."[42] Since the passions often "pervert rulers and [even] the best men,"[43] the rule of law must be superior even to the rule of good and prudent statesmen. On the other hand, laws are too rigid and "do not command with a view to circumstances."[44] Sometimes the law judges poorly, because the law is blind to particulars; for this reason, "the best regime is not one based on written . . . laws," but one that authorizes wise and virtuous rulers to judge with a view to circumstances.[45] That Aristotle would reach a conclusion that differs from Locke's is of course unsurprising. The case for the rule of law is surely strongest where the end of political life is liberty, or liberty understood as security. But suppose (against the liberal) that the salvation of souls, or the propagation of the truth, or the inculcation of virtue is the true end of political life. In that case, it is not at all clear that the rule of law would be superior to the rule of certain human beings—say, the pious, or the wise, or the virtuous.

But Locke argues that rule by consent is safer than the rule of the putatively wise. Wisdom is rare, and who can tell the difference between wisdom and a clever fraud? Better to trust ourselves: We may not know our own best interests as well as some philosopher (or judge), but we can be sure that we have our own best interests at heart. Here is the danger: The natural condition of human beings, in the absence of a common judge who can enforce common judgments about political right, is an incipient war of all against all. But this is surely an unstable situation, one that almost inevitably leads to the

40. *Id.* at 343 (emphasis in original).
41. ARISTOTLE, THE POLITICS 111 (Carnes Lord trans., Univ. Chicago Press 1984).
42. *Id.* at 114.
43. *Id.*
44. *Id.* at 111.
45. *Id.* at 111, 114.

establishment of tumultuous and illiberal political communities where petty warfare is replaced by partisan and sectarian warfare—often between rich and poor, sometimes among religious sects or other parties animated by one or another of the bizarre opinions contrived by the imaginations of human beings. There is a kind of communitarian logic about war: Human beings at war seek allies because they have enemies. Alliances, parties, sects will soon conceive the ideologies or dogmas that are necessary to justify oppressing their enemies, thus arming the warlike passions by civilizing them. (This is the natural origin of "community.") Here, then, is a task for the so-called wise: to teach the myths and ideologies that constitute illiberal communities. "And when Fashion hath once Established, what Folly or craft began, Custom makes it Sacred, and 'twill be thought impudence or madness, to contradict or question it."[46] So-called wisdom is often or always the craft of demagogues, ideologues, or sectarians.

What is called wisdom is mere "private judgment," says Locke,[47] following Hobbes,[48] and private judgment is simply not to be trusted. Hence, the liberal social contract: "[A]ll private judgment of every particular Member being excluded, the Community comes to be Umpire, by settled standing Rules, indifferent, and the same to all Parties, . . . concerning any matter of right." [49] Liberal government is government established by the consent of free and equal persons, with no privileges granted to any species of private judgment. As Walter Berns argues,

> each man agrees that his opinions of good and bad, right and wrong, justice and injustice are just that—private opinions—and the principle of equality requires him to acknowledge that other opinions, even if they are contrary to his own, have as much (or as little) dignity as his own .... Leave other men alone in exchange for the promise, which the sovereign will enforce, to leave you alone. The happy consequence of this sovereign's peace is liberty, which is why some have given the name liberalism to this kind of politics.[50]

Thus, "in a world where all opinions of justice and injustice are understood to be merely private opinions, no man can rationally

46. LOCKE, *supra* note 7, at 183; *see also* KAUTZ, *supra* note 8, at 32 (discussing these problems).

47. LOCKE, *supra* note 7, at 324.

48. *See* THOMAS HOBBES, *The Citizen*, *in* MAN AND CITIZEN 87, 97 (Bernard Gert ed., 1991) ("the sayings and judgements of private men").

49. LOCKE, *supra* note 7, at 324.

50. WALTER BERNS, *Judicial Review of the Rights and Laws of Nature*, *in* IN DEFENSE OF LIBERAL DEMOCRACY, *supra* note 19, at 29, 40.

agree to an arrangement where another man is authorized to convert his opinion into fundamental law."[51]

The rule of law has an unusually distinguished place in the classical liberal understanding of politics, above all because the natural lawlessness of the human passions is the principal threat to a civilized politics. But there is a second reason for the unusual respect for the rule of law of liberal theorists: an abiding suspicion of all "private judgment," even the private judgment of the putatively wise. For this reason, too, government of laws is superior to government of men: Rule by consent ensures greater security than the rule of the wise exercising private judgment beyond consent.

Now, where is "justice" in this liberal teaching? Is justice simply obedience to law, and no more? Must the liberal say: Who cares what the laws forbid and what they permit, so long as they are obeyed? Indeed, Locke does sometimes go so far as to conclude that an established civil law that enjoys the consent of the people is superior to the Law of Nature itself:

> For though the Law of Nature be plain and intelligible to all rational Creatures; yet Men being biassed by their Interest, as well as ignorant for want of study of it, are not apt to allow of it as a Law binding to them in the application of it to their particular Cases.[52]

Forget about justice ("the Law of Nature"), Locke almost says: That is an imagination. Attend instead to the business of establishing and preserving the rule of law.

Put another way, the dignity of law in liberal political theory is achieved, it now appears, by means of diminishing the claims of justice—and therefore, incidentally, of political philosophy. On the view advanced so far, the business of the lawyer is simply to sustain respect for law, *and no more*. Indeed, for the lawyer to worry too much about justice might appear to be a dangerous attempt to smuggle into the liberal polity a species of private judgment. This is the fundamental ground of the frequent complaint about "activist" judges—that they are practicing a sort of judicial tyranny, substituting the private judgment of the philosopher-judge for the consent of the people.

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51. *Id.* at 54.

52. LOCKE, *supra* note 7, at 351. The quoted passage occurs in the context of Locke's specifications of the conditions for the rule of law: an established, settled, known law; a known and indifferent judge; and a means of ensuring that the collective force of the community will be employed to enforce the laws and the judgments of the courts. *See also id.* at 324 (arguing that "all private judgment of every particular Member being excluded, the Community comes to be Umpire, by settled standing Rules, indifferent, and the same to all Parties").

III. LIBERAL JUSTICE

Respect for the rule of law is the heart of liberal justice. To say this is, perhaps, to embrace the disreputable sophistic argument that there is no justice beyond the law because justice is the advantage of the established ruling body. The liberal might respond that here the established ruling body, or sovereign, is the *whole* people. However *that* may be, the classical liberal principle is also at least akin to the harsh, but more respectable, Hobbesian doctrine that, there being no calamity so terrible as civil war, any political order is superior to disorder. The argument so far suggests that liberty (or security) arises at least as much from the mere fact of the rule of law as from the content of the laws: Who cares what the laws permit and what they forbid, so long as they are obeyed?

But this conclusion is not quite right. As Locke says in opposition to Hobbes:

> *Absolute Monarchs* are but Men, and if Government is to be the Remedy of those Evils, which necessarily follow from Mens being Judges in their own Cases, and the State of Nature is therefore not to be endured, I desire to know what kind of Government that is, and how much better it is than the State of Nature, where one Man commanding a multitude, has the Liberty to be Judge in his own Case, and may do to all his Subjects whatever he pleases, without the least liberty to any one to question or controle those who Execute his Pleasure?[53]

The rule of law, with no man a judge in his own case, is itself a bedrock principle of justice for the liberal Locke (as it is not for the illiberal Hobbes): No citizen can be above the law. Yet, the *end* of government here is still security. Putting the point most generally, a so-called law (or constitutional design) that failed to uphold or respect the rule of law as a constitutional principle would be unjust. For Locke, one might say, justice is obedience to law, so long as the rule of law generally is faithfully respected—that is, so long as there is government of laws, not of men.

And yet, this is evidently a very low standard of justice, in light of which almost all laws in a liberal constitutional republic would surely pass muster. Liberal justice demands that the constitution of the liberal polity establish the rule of law. But liberal justice tells us little or nothing, on this view, about what those laws should permit or forbid. Again, consider Montesquieu's radical but precise formulation of the point: "Liberty is the right to do everything the laws permit; and if one citizen could do what they forbid, he would

53. *Id.* at 276.

no longer have liberty because others would likewise have this same power."[54] Liberty is mutual obedience to law; justice is the (constitutional) establishment of the rule of law.

To be sure, the idea of the rule of law *can* serve as a rather robust principle of constitutional right, or justice. But the present point is that this principle is (on the whole) procedural rather than substantive. That is, liberal justice demands that no citizen be above the law; that the law be well settled and duly promulgated; that the forms of popular consent be respected; that the judges be known and impartial; that the judgments of courts be fully and equitably enforced; and so on. But it is hard to discover in the idea of the rule of law itself any substantive principles of liberal justice, except—perhaps, and only at some fairly high level of generality—a commitment to equality, especially equality of natural rights. This argument is one theoretical ground for the doubts of some lawyers regarding the idea of "substantive" due process: The attempt to smuggle substantive principles of justice into the idea of due process, or the rule of law, goes well beyond the terms of the liberal social contract, which is the origin of this constitutional guarantee.

This feature of the classical liberal argument is accentuated by the liberal suspicion of so-called "private judgment." That is, if the forms of popular consent are unlikely to yield agreement on robust substantive principles of justice (as not only Locke, but also Rawls and other contemporary "political liberals" would seem to admit, on the ground that liberal polities are ordinarily marked by deep disagreements regarding justice),[55] then such principles will most commonly issue from the suspect "private judgments" of some party or sect. This emergence of private judgment is one origin of populist complaints about political elitisms on both the left and the right—for example, the elitism of the foreign policy establishment on free trade issues, or the elitism of the legal establishment on privacy issues. Such substantive principles of justice will, in other words, often reflect an illicit attempt by some party or sect to claim a right to rule beyond consent, on the basis (more or less) of superior wisdom or knowledge. So, for this reason too, substantive principles of justice are suspect, on the classical liberal view.

A friend of liberalism might object at this point that even classical liberalism contains a substantive teaching about political right, or justice. Thus:

54. MONTESQUIEU, *supra* note 9, at 155.

55. *See* JOHN RAWLS, POLITICAL LIBERALISM at xvi (1993) (arguing for a political liberalism that recognizes that "a modern democratic society is characterized not simply by a pluralism of comprehensive religious, philosophical, and moral doctrines but by a pluralism of incompatible yet reasonable comprehensive doctrines").

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.[56]

What has been missing from this account of liberal justice, it might be said, is sufficient regard for the rationalism ("self-evident truths") and the egalitarianism ("all men are created equal") of liberalism.[57] Liberal justice is not merely obedience to law: It is *reasonable* obedience to laws that respect the natural *equality* of human beings.

Begin with liberal rationalism. Liberalism is a doctrine of consent. But consent is surely an empty idea unless one can plausibly affirm the existence of human beings of a certain kind—human beings who can, on the basis of good reasons, constitute their own communities and who are therefore not, or not wholly, constituted by their communities. Otherwise, "consent" is a sort of fraud perpetrated by the most effective myth-makers of community, who know how to secure passionate agreement (but not reasonable consent) by appealing to irrational fears and hopes. Such "consent" would simply mask the hidden rule of some private judgment. In that case, perhaps it would be better to choose the open rule of private judgment. Liberals must deny that consent is empty in this way. As Michael Walzer has argued, "it has been the great triumph of liberal theorists and politicians to undermine every sort of political divinity, to shatter all the forms of ritual obfuscation, and to turn the mysterious oath into a rational contract."[58] That liberal achievement goes well beyond the establishment of the rule of law.[59]

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56. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

57. And yet, a glance at this famous passage suggests that there is much truth to the suspicion that liberal justice is principally procedural: "the consent of the governed"; "laying its foundation on such principles and organizing its powers in such form, as to them shall seem . . ." *Id.*

58. MICHAEL WALZER, RADICAL PRINCIPLES 25 (1980). For this and the following two paragraphs, *see generally* KAUTZ, *supra* note 8, at 19-21, 38-41, 192-93.

59. It seems possible that this argument might yield certain substantive principles of justice that would merit legal or constitutional protection. Thus, for example, one might reason that a liberal polity must secure the conditions for consent, or for the reasonable love of liberty, and that certain forms of freedom of speech (or, perhaps, freedom of the press) are indispensable to the freedom of thought that is the inescapable foundation of political freedom. *See, e.g.*, SUNSTEIN, *supra* note 24. Beyond this, one might even claim, though it is a much messier case, that this argument yields the conclusion that the principal task of the Supreme Court is

Liberalism requires the cultivation of autonomous men and women who can choose their political principles on the basis of good reasons, not on the basis of a history or tradition that is beyond our choosing, and not under the sway of demagogues, ideologues, or priests. And the cultivation of such liberal citizens surely requires more than the establishment of the rule of law. Here then is a substantive liberal principle of justice: The liberal polity must ensure to its citizens a sort of liberal education, an education toward a way of life of reasonable freedom. Hence Locke is the author of the *Thoughts on Education*, as well as of the *Two Treatises of Government.*

Such reasonable freedom is possible only if "there is something in man that is not altogether in slavery to his society."[60] For the liberal, political freedom is founded on freedom of thought. That is, the most honorable liberal citizens will be (at least potentially) rebels or dissenters or moral strangers to their communities, not obedient, law-abiding subjects. But this cannot mean merely that liberals seek freedom from the particular officeholders who possess political power, narrowly understood, here and now. Such freedom is indeed quite important from a certain point of view, but it is surely incomplete. The freedom from authority that the liberal seeks is not simply freedom from this or that particular petty authority in power today; it is also, and more fundamentally, freedom from those greater authorities, the ruling orthodoxies in a political community and their interpreters, the teachers of those who hold power. If such freedom is not possible for human beings, then neither is political freedom, for in that case politics would everywhere, including in liberal polities, authorize the tyranny of those partisan or sectarian authorities who happen to write the founding myths of the community. If liberalism is defensible, moral freedom from the authority of community must be possible: Only those who are able to think for themselves are truly able to choose for themselves. As Nathan Tarcov says of Locke's political theory: "Rationality enables and entitles us to be free, whether from political tyranny, as in the *Two Treatises*, or from intellectual superstition and authority, as in the *Essay*."[61] Insofar as liberalism is a doctrine of (reasonable)

"policing the process of representation," thus ensuring that the forms of consent do not mask the hidden rule of some private judgment. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 73-104 (1980).

60. LEO STRAUSS, NATURAL RIGHT AND HISTORY 3 (1953).

61. TARCOV, *supra* note 7, at 211. Thus, a liberal could never assent to the stronger version of the claim that justice is obedience to law that Alasdair MacIntyre defends in his fine essay *Is Patriotism a Virtue?* MacIntyre argues that, from a certain point of view, "liberal morality is a permanent source of moral danger because of the way it renders social and moral ties too open to dissolution by rational criticism." ALASDAIR MACINTYRE, IS PATRIOTISM A VIRTUE? 18

consent, liberal justice requires more than establishment of the rule of law. It follows that there is a role for the political philosopher in the liberal polity: to aid in educating the public mind toward reasonable love of liberty.

Next, consider liberal egalitarianism. Of course, the idea of equality is already somehow implicit in the idea of the rule of law, for reasons already sufficiently indicated. On the other hand, perhaps it is sufficient to notice that the procedural equality achieved by establishment of genuine rule of law—where there is government of laws and not of men—is not an especially dignified or noble equality. Moreover, such equality is not the *end* of liberal political life, but a *means* to liberty understood as security. For this reason, it is hard to imagine that a liberal republic founded on equality thus understood (strict equality before the law, whose aim is to achieve the end of liberty, and no more) could inspire loyalty to the community, or patriotism, in citizens. Put otherwise, the equality of which Lincoln speaks in the Gettysburg Address is something more robust and more splendid than the equality of the Declaration of Independence; it thus earns, so to speak, the last full measure of devotion.

The meaning of equality in a liberal polity is, of course, a controversial question, and I do not aim to settle it here. For present purposes, I want simply to argue that the achievement of substantive equality (however understood) must always follow upon the achievement of consent (procedural equality), according to the classical liberal view. That is, only when a certain substantive understanding of equality enjoys the reasonable consent of the people can it fairly (that is, consistently with the rule of law and the abolition of the claims of private judgment) be said to be embodied in the law of a liberal polity.

Consider the exemplary case of Lincoln, the most remarkable partisan of the idea of equality in American political history. Lincoln understood his task during the late 1850s, and again during the war, to be the task of educating the public mind regarding the meaning of the nation's dedication to the proposition that all men are created equal. The drama of such a liberal education toward a reasonable love of liberty consists in the necessity to harmonize respectable conservative and radical impulses, to stand now inside and now outside the community, to reconcile justice with consent. Such an

(1981). Indeed, "loyalty to [one's] community . . . is, on this view[,] a prerequisite for morality"; and this loyalty must be "in some respects unconditional, so in just those respects rational criticism is ruled out." *Id.* That "communitarian" moral understanding, now so common among political theorists, is utterly incompatible with liberal principles of justice, above all because it undermines the liberal doctrine of consent.

education toward liberty enables human beings to move between the kind of thick description of a way of life that Walzer calls "interpretation" and the more Socratic quest for a way out of the cave that Walzer (as well as most contemporary theorists) eschews.[62]

Lincoln's task in the 1850s and during the war was to *achieve justice* in a way that was compatible with the liberal principles of the Declaration: that is, *by consent.* Here, I can only summarize the conclusions of a longer argument, but the case seems to me to provide a useful illustration of the relation of justice and consent in a liberal polity. Lincoln was a moderate statesman. His moderation consisted in a prudent regard for the weak hands of justice in this world, but such a regard does not abandon the cause of justice to its enemies.[63] Begin with the first question of Plato's *Republic.* "What if we won't listen?" Socrates' friend asks playfully. But the play contains a serious warning: Justice is weak and needs friends. "What if we won't listen?" says power to wisdom: That is *the* problem of political philosophy, then and now. Everywhere, the stronger rule. Justice can make its way in the world only if the stronger are somehow induced to listen, to hear the reasons of its friends. Moderation is the political virtue that mediates between reason and power.

Consider, for example, Lincoln's reluctance to accede to policies at the outset of the Civil War that might have transformed the war into a "remorseless revolutionary struggle" over the status of slavery in the nation.[64] This reluctance greatly troubled his more radical

62. *See* MICHAEL WALZER, INTERPRETATION AND SOCIAL CRITICISM 3-32 (1987). Lincoln and Frederick Douglass are two notable cases of the hybrid social criticism described in the text. It would not be easy to say whether these men were conservatives or radicals. Douglass, a former slave and an abolitionist, despised the hypocrisy of those who professed a faith in the principles of the Declaration of Independence and the Constitution while remaining indifferent to the evident injustice of slavery. Yet, during most of his public life he was a vigorous partisan of the Constitution, and he argued (against many of his abolitionist friends) that fidelity to the Constitution was the ground on which those animated by an honorable and patriotic aspiration to abolish slavery must stand. Douglass commonly speaks as both a citizen and a philosopher, a patriotic American and a radical critic of what Americans had done, an angry friend of his fellow citizens and a bitter enemy who loves justice. So too, Lincoln's speeches reveal a mind at once conservative and radical: The Gettysburg Address and, in a more prosaic mode, the Peoria and Cooper Institute speeches are masterly expositions of the principles of the American regime. By contrast, the Second Inaugural and the Lyceum speech, and many remarks scattered throughout his more ordinary speeches, are radical expressions of doubt regarding the justice and health of American institutions. Each man was at ease speaking both of our duties as American citizens and of our essential humanity. This broadmindedness, among other virtues (the capacity to temper justice with mercy, indignation with charity, and to resist both blind love and foolish moralism), enabled these statesmen to raise their community above itself, so to speak, for a time. *See* Steven Kautz, *The Postmodern Self and the Politics of Liberal Education, in* THE COMMUNITARIAN CHALLENGE TO LIBERALISM 164, 167-71 (Ellen Frankel Paul et al. eds., 1996).

63. On Lincoln's "deadly moderation," see LORD CHARNWOOD, ABRAHAM LINCOLN 114-15 (1996).

64. Abraham Lincoln, Annual Message to Congress (Dec. 3, 1861), *in* ABRAHAM

Republican and abolitionist friends. It was manifested above all in his early understanding of the proper war aim of the North—to preserve the Union, not to emancipate the slave. According to the ordinary view, some combination of political prudence (concern about driving away the border states and Northern Unionist supporters of the war) and constitutional scruple (concern about the limits of presidential and even congressional power to free the slaves) led Lincoln to resist the impulse toward embracing emancipation as a war aim. True enough. But it is also worth emphasizing Lincoln's argument from self-government, and more generally his desperate desire that emancipation be achieved by some form of popular consent (hence, his continuing efforts to induce border states to accept gradual and compensated emancipation, even after the decision to issue the Emancipation Proclamation had been taken).[65]

In a liberal democracy, where the people are mighty, it is the task of the democratic statesman to educate the public mind—to teach the people, who are naturally as disposed to wickedness and folly as are the mighty in other regimes, to love justice, or at least to hear the reasons of the friends of justice. The moderation of such a statesman consists in a prudent regard for the difficulty of this task: Shouting won't do. The moderate statesman must look now toward justice—toward the principle of the Declaration, for example, that "all men are created equal"—and now toward the people, whose passions, prejudices, and interests must be consulted (accommodated, tamed, and educated) in a democracy. Sometimes those passions and prejudices will be for a time incurable. In such a case, silence or even a deceptive indulgence of the prejudice is demanded. But sometimes the passions and interests of the people might somehow be attached to a nobler end, and the people might thereby be led to listen to the claims of the friends of justice. This is the story, it seems to me, of Lincoln's political rhetoric during the 1850s.

Lincoln saw that the same Declaration that announces the inalienable rights of human beings also affirms that government derives its just powers from the consent of the governed. Here we

LINCOLN: HIS SPEECHES AND WRITINGS 630 (Roy P. Basler ed., 1946) [hereinafter LINCOLN'S WRITINGS].

65. Or, consider Lincoln's insistence, during the 1850s and especially during the debates with Douglas, that the question of the ultimate extinction of slavery be kept separate from the question of the social and political equality of the races. In Lincoln's view, once these causes were united, they would surely fall together. *See, e.g.*, Abraham Lincoln, Speech at Peoria, Illinois, *in* LINCOLN'S WRITINGS, *supra* note 64, at 291-92; Abraham Lincoln, First Debate, *in* LINCOLN'S WRITINGS, *supra* note 64, at 442-45. This is the strategy of a moderate democratic statesman, who serves the cause of justice by leading the people where they are prepared to be led, while not arousing their uglier passions and prejudices, thus securing the consent of the people to some part of what justice demands.

have, to say no more, competing principles of justice, and those principles are not always in harmony, as the terrible case of American slavery reveals. So Lincoln's task, the task of a liberal democratic statesman, was not only to accommodate the power of the people, who are sometimes wicked and sometimes foolish, and who will sometimes say to their teachers of justice, "What if we won't listen"? Not only this, but Lincoln was also obliged to recognize the justice of the claim of the people to rule. That is the principle of Lincoln's moderation: The claims of justice made on behalf of the slave ("all men are created equal") had to be harmonized with the lesser, but respectable, claim of the people to rule (both because the people are the stronger and because the consent of the governed is the foundation of just government).

Certainly, there is more to liberal justice than the "rule of law." As political theorists, and above all as citizens, it is our business and sometimes our duty to reflect upon these higher meanings of liberal justice—principally, I have argued, to reflect upon the importance of freedom of thought and the meaning of equality in a liberal community. But I have also argued that the higher meanings of liberal justice are properly subordinated to the first and fundamental meaning of liberal justice—namely, that the most fundamental task of liberal government is to establish and maintain the rule of law founded on the consent of the people. Only when a certain substantive understanding of justice enjoys the reasonable consent of the people can it fairly be said to be embodied in the *law* of a liberal polity consistent with the rule of law and the abolition of the claims of private judgment. It is the business of political theorists (and statesmen and citizens) to educate the public mind regarding the higher meanings of liberal justice, but it is the duty of lawyers to ensure that the most fundamental form of liberal justice—the rule of law, established by consent—is preserved.

IV. Political Philosophy and Legal Reasoning

Here is the older conventional view: It is the business of political philosophers to worry about justice; it is the business of lawyers and judges to worry about the law. Put another way, political philosophers say what the law *ought to be*; lawyers and judges say what the law *is*. These are fundamentally different sorts of inquiries.

I have argued that the task of liberal political theory and liberal statesmanship is to ensure, above all else, that one citizen need not fear another citizen. Here in the liberal polity, as George Washington says in a justly famous letter to the Hebrew Congregation of Newport, "every one shall sit in safety under his own vine and figtree, and there

shall be none to make him afraid."[66] That is liberty. It follows that the idea of the rule of law—understood in Montesquieu's way as mutual obedience to law, and no more—will have an unusually proud place in liberal theory and practice. That is because the rule of law is the principal remedy for the most fundamental and natural disorder of political life—that human beings have too many good reasons to fear their fellow citizens and so they must take good care to provide for their mutual security. Beyond this, I have argued that the idea of consent is the fundamental principle of liberal justice; no special privileges may be granted to any species of "private judgment" on the liberal view. Liberals cannot abide any form of the common pre-liberal argument that wisdom and virtue are titles to rule. When we liberals say that government by law is to be preferred to government by men, we mean that government by the consent of free and equal persons will ensure greater security than government by the putatively wise or virtuous exercising private judgment beyond consent. It follows that no quest to achieve "substantive justice" can be permitted to evade the rigorous requirements of the liberal doctrine of consent. Liberty (and thus consent) is prior to justice.

If the argument here is right, the tasks of the liberal lawyer and the liberal political theorist are fundamentally different. But the line between legal reasoning and political philosophizing in contemporary legal scholarship is in fact often blurry, indistinct, or even erased. And this is a notable tendency across the political spectrum, from Critical Legal Studies and various species of postmodernism in the law on the left, to mainstream jurisprudential thought and the new "republican" legal theories in the center, to economic analysis of the law on the right.

The line between legal reasoning and political philosophizing, between law and justice, can of course be erased from either side. It is erased from the side of law wherever legal scholars and judges learn to say, with Dworkin (speaking of the U.S. Supreme Court):

> We have an institution that calls some issues from the battleground of power politics to the forum of principle. It holds out the promise that the deepest, most fundamental conflicts between individual and society will once, someplace, finally, become questions of justice. I do not call that religion or prophecy. I call it law.[67]

And it is erased from the side of justice wherever political theorists deny that the distinction between justice and law can be sustained—

66. Letter from George Washington to the Hebrew Congregation of Newport (Aug. 18, 1790), *in* GEORGE WASHINGTON: WRITINGS 767 (John Rhodehamel ed., 1997).

67. DWORKIN, *supra* note 6, at 71.

that is, wherever political theorists teach that justice is no more than the advantage of the established ruling body, or that so-called justice is simply obedience to laws made by the powerful for their own advantage. On this radical view, there is no justice, there is only law; and law is only power. There is no path from the cave of power and prejudice to the sun of neutrality and objectivity—either by way of law's putative neutrality or by way of an objective philosophical account of justice. Thus, for example, "it is an article of faith [among radical legal theorists] that legal rules are indeterminate and serve only to disguise the law's white, male bias."[68]

But here I will focus on the first sort of argument that blurs the line between legal reasoning and political philosophizing. How far must legal reasoning, and especially constitutional interpretation, rest upon moral and political philosophy, or upon a substantive (not merely procedural) account of justice? The most important book of the most celebrated contemporary legal scholar, Ronald Dworkin's *Taking Rights Seriously*, famously contains the following, now remarkable, passage:

> Constitutional law can make no genuine advance until it isolates the problem of rights against the state and makes that problem part of its own agenda. That argues for a *fusion of constitutional law and moral theory*, a connection that, incredibly, has yet to take place. It is perfectly understandable that lawyers dread contamination with moral philosophy, and particularly with those philosophers who talk about rights, because the spooky overtones of that concept threaten the graveyard of reason. But better philosophy is now available than the lawyers may remember. Professor Rawls of Harvard, for example, has published an abstract and complex book about justice which no constitutional lawyer will be able to ignore.[69]

By now, such "dread" of moral philosophy, including rights talk, is rather quaint. To be sure, a few legal scholars and political theorists still fear that liberal theorists who talk about rights are talking "nonsense upon stilts."[70] But not many. And they too can have their pick of an extraordinary variety of other newly-revived modes of political theorizing, from utilitarianism to republicanism to postmodernism to feminism and even classical liberalism. The revival

68. DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW 5 (1997); *see also id.* at 37 (arguing that this "indeterminacy thesis" is "intimately related to the radicals' view that objectivity and neutrality are merely shams concealing a dominance game").

69. DWORKIN, *supra* note 5, at 149 (emphasis added).

70. JEREMY BENTHAM, *Anarchical Fallacies*, *in* 2 THE WORKS OF JEREMY BENTHAM 491, 501 (John Bowring ed., 1843).

of political theory in the law follows, of course, the resurrection of political theory itself, the death of which had been prematurely pronounced in the 1950s and 1960s. The lawyer's dread of moral philosophy has unquestionably been overcome.

But now that we are all moral and political philosophers—and, indeed, much of the best contemporary moral and political philosophy is contained in the writings of legal scholars—a nice question arises regarding the legitimacy of applying the discoveries and inventions and interpretations of moral and political philosophers in the courts. The problem of legitimacy is pressing for two reasons. First, as Montesquieu reminds us, the court can be the most terrible department of government in a liberal polity.[71] Here, the collision between the power of the state and the interests and rights of individuals is most raw; here, liberal citizens risk the loss of life, liberty, and property, and so they have a right to demand the most rigorous fidelity to the rule of law. If we must be deprived of life and liberty, the liberal citizen says, let it be by rules of law founded on common consent, and not by rules of law founded on the private judgments of moral philosophers (perhaps less friendly to currently favored liberties than Rawls). Here, in short, the emancipation of private judgment is most dangerous to individuals.

Second, as is well known, the legitimacy of blurring the line between moral philosophy and legal reasoning is a problem when courts strike down, as unconstitutional, laws that presumably reflect the judgment of democratic majorities. As Dworkin powerfully puts the objection:

> It seems to erode the crucial distinction between law and morality by making law only a matter of which moral principles happen to appeal to the judges of a particular era. It seems grotesquely to constrict the moral sovereignty of the people themselves—to take out of their hands, and remit to a professional elite, exactly the great and defining issues of political morality that the people have the right and the responsibility to decide for themselves.[72]

Suppose that *A Theory of Justice* is indeed "better philosophy" than *Two Treatises of Government.* So what? On this question, the work of Ronald Dworkin is inescapable. In a series of important books, including *Taking Rights Seriously*,[73] *A Matter of Principle*,[74] and most recently *Freedom's Law: The Moral Reading of the American*

71. *See* MONTESQUIEU, *supra* note 9, at 158.

72. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE CONSTITUTION 4 (1996).

73. DWORKIN, *supra* note 5.

74. DWORKIN, *supra* note 6.

Constitution,[75] Dworkin has argued that judges simply cannot escape questions of substantive justice, or of moral and political philosophy, both when they interpret the Constitution and more generally when they apply the law in hard cases:

> Our constitutional system rests on a particular moral theory, namely, that men have moral rights against the state. The difficult clauses of the Bill of Rights, like the due process and equal protection clauses, must be understood as appealing to moral concepts rather than laying down particular conceptions; therefore a court that undertakes the burden of applying these clauses fully as law must be an activist court, in the sense that it must be prepared to frame and answer questions of political morality.[76]

In what follows, I propose to consider Dworkin's argument for the necessity of a fusion of moral theory and constitutional law. I argue that a number of pathologies arise from the failure of Dworkin (and many other legal scholars and judges of various ideological views) to respect essential liberal boundaries between legal reasoning and political theorizing. The account here is abstract—that is, it does not do justice in particular cases. But I mean to identify broad tendencies, and I suppose that these will be recognized. The three pathologies that I will discuss are these: Constitutional doctrine is today founded on *too much philosophy (or "private judgment") and too little consent (or "public philosophy")*; this feature of our constitutionalism has contributed to a *decline of popular capacities for self-government*; and, as a consequence, we have lately experienced a self-destructive *rise of "rights talk."*

Dworkin's fundamental argument can be sketched in outline form. Many of the most important provisions of the Bill of Rights and the Fourteenth Amendment are "vague" and "abstract." How could it be otherwise in a Constitution designed to govern a dynamic polity and an energetic people not today only but for many future generations? So we must presume that the Constitution's authors chose vagueness or abstraction for a good reason, or with an intention. What was that original intention? Dworkin here develops a now famous distinction between "concepts" (of fairness, equality, cruelty, and so on) and "conceptions" (of fairness, equality, cruelty, and so on).[77] "Suppose I tell my children simply that I expect them not to treat others unfairly," he asks.[78] What do I mean thereby to forbid? Possibly I have in mind a

75. DWORKIN, *supra* note 72.
76. DWORKIN, *supra* note 5, at 147.
77. *Id.* at 134-35.
78. *Id.* at 134.

number of specific kinds of unfair conduct that I intend to forbid. Indeed, it is even possible that I mean to forbid *only* these actions. But surely this is unlikely (why not present a concrete list of rules proscribing specific conduct, in that case, rather than an abstract command?). The abstract character of my statement, Dworkin argues, suggests that I intend to say something broader and more indeterminate: I mean to instruct my children "to be guided by the *concept* of fairness, not by any specific *conception* of fairness I might have had in mind."[79] That is, I mean to forbid conduct that is "in fact unfair," as a general rule and not only in the particular sorts of cases that I might have had in mind; this requires my children to apply a concept of fairness beyond and *perhaps even against* my particular conception of unfair conduct.[80] In order to comply with my command, Dworkin argues, my children must think about what "fairness" means and must act on the basis of their best understanding of "fairness"; indeed, "I give my views on that issue no special standing."[81] (This last development of the argument seems to me wildly implausible with respect to the case of parental instructions to children, and somewhat misleading with respect to questions of constitutional interpretation.)

Dworkin argues that many of the most important constitutional clauses protecting individual rights contain abstract moral concepts of this kind.[82] So far, so good. Surely the authors of these constitutional provisions meant to establish abstract guarantees of the sort Dworkin describes. But does it follow that "lawyers and judges cannot avoid politics in the broad sense of political theory," or that constitutional interpretation is inescapably a species of moral and political philosophy?[83] Take Dworkin's argument on cruelty:

> It would be a mistake for the Court to be much influenced by the fact that when the clause was adopted capital punishment was standard and unquestioned. That would be decisive if the framers of the clause had meant to lay down a particular conception of cruelty, because it would show that the conception did not extend so far. But it is not decisive of the different question the Court now faces, which is this: Can the Court, responding to the framers' appeal to the concept of cruelty, now defend a conception that does not make death cruel . . . ? But in fact the Court can enforce what the Constitution says only by making up its own mind about what is cruel, just as my children, in my example, can do what I said

79. *Id.*
80. *Id.*
81. *Id.* at 135.
82. *See id.* at 134-35.
83. DWORKIN, *supra* note 6, at 146.

only by making up their own minds about what is fair.[84]

This seems to me a step too far. Dworkin argues that once one concedes that a constitutional provision is designed to establish an abstract guarantee, it follows immediately that "judges must make substantive decisions of political morality not in place of judgments made by the 'Framers' but rather in service of those judgments": Political theory is inescapable.[85] But surely there is an intermediate possibility: The authors of a constitutional provision might have intended to establish an abstract guarantee (and not merely guarantees of a specific list of particular rights "recognized . . . at a fixed date in history"[86]), but they might have understood this abstract guarantee to have a determinate and unchanging meaning. That is, they would have been prepared to concede that some of their particular conceptions might have been in error (that segregated schools violate the abstract guarantee of equal protection, say, even on the original and determinate meaning of equal protection), in which case their particular judgment would properly be subject to correction by a future Court more faithful to the original moral concept than its authors had been. And such a correction would indeed be, as Dworkin says, an act of fidelity to the original intention of the authors of the constitutional provision—saving their better (abstract) judgment from their worse (particular) judgments.

And yet, it certainly does not follow that the framers of abstract constitutional provisions would (necessarily or even probably) have been prepared to concede that their moral concepts themselves might have been so far in error as to justify correction by a future Court guided by a "better philosophy." For example, they surely would not have conceded that the moral concept "equality" is properly understood as Rawls understands it in *A Theory of Justice*, say; and so they would not have conceded that the Court should rest its judgments upon this concept of equality rather than upon a concept of equality that might conceivably have guided the authors of the Equal Protection Clause. Indeed, Dworkin's whole argument here seems to rest on an equivocation: Equality here, equality there, we must be talking about the same thing. But Dworkin consistently makes this stronger claim, as in the passage cited above regarding cruelty: The original moral concept is no more privileged than the original conceptions (just as the parent supposedly refrains from giving his

84. DWORKIN, *supra* note 6, at 135-36. See also the recent exchange on this point between Dworkin and Justice Scalia, in ANTONIN SCALIA, A MATTER OF INTERPRETATION 119-27, 144-49 (Amy Gutmann ed., 1997).

85. DWORKIN, *supra* note 6, at 49.

86. DWORKIN, *supra* note 5, at 134.

own views on the meaning of fairness special standing). Thus Dworkin urges the Court to "revise these principles from time to time in light of what seems to the Court fresh moral insight."[87] He argues that the "better interpretation" of a legal rule is simply one that "states a sounder principle of justice" than the alternatives.[88] In particular, Dworkin argues,

> there can be no useful interpretation of what [the Equal Protection Clause] means which is independent of some theory about what political equality is and how far equality is required by justice, and the history of the last half-century of constitutional law is largely an exploration of exactly these issues of political morality."[89]

Most radically, in his most recent statement on this issue Dworkin argues that

> very different, even contrary conceptions of constitutional principle—of what treating men and women as equals really means, for example—will often fit language, precedent, and practice well enough to pass these tests [the tests imposed by "the ordinary craft of a judge"], and thoughtful judges must then decide on their own which conception does most credit to the nation.[90]

What if we resist Dworkin's stronger claim, while conceding the force of the fundamental distinction between "concepts" and "conceptions"? Then wouldn't we be obliged to grant a privileged or even decisive force to a kind of original meaning—not to the particular conceptions held by the framers of such constitutional provisions, but to their philosophical understanding of the abstract moral concepts that they chose to establish in the Constitution? That is, we would impose upon the judge a different sort of task than the philosophical task that Dworkin insists is inescapable. We would ask the judge to undertake an historical inquiry, not a philosophical inquiry—or, more precisely, we would ask the judge to study philosophy in the manner of an historian of philosophy, not in the manner of, for example, a philosopher. We would not ask the judge to eschew philosophy in favor of narrow historical inquiry regarding how the framers of a constitutional provision would have answered

87. DWORKIN, *supra* note 5, at 137.

88. DWORKIN, *supra* note 6, at 161.

89. *Id.* at 165.

90. DWORKIN, *supra* note 72, at 11. On "which conception does most credit to the nation," see *id.* at 7-8, 10; and DWORKIN, *supra* note 6, at 181-213. *See also* DWORKIN, *supra* note 6, at 149 (analogizing constitutional interpretation, where judges decide "on their own which conception does most credit to the nation," to literary criticism, where the critic "attempts to show which way of reading . . . the text reveals it as the best work of art").

the specific question before the court. Instead, we would ask the judge to undertake a broader historical inquiry into the philosophical meaning of the moral and political "concepts" embraced by those framers. We would ask the judge to draw the philosophy of the Constitution out of the Constitution itself, which is fundamentally a historical task, and not to impose a "better philosophy" on the Constitution from the outside. Thus, on cruelty, we would not ask, "would the framers have concluded that the death penalty is unconstitutional because it is a cruel punishment?" (This is a too narrow historical inquiry into the particular conceptions of the framers.) Nor would we ask, "is the death penalty in fact a cruel punishment, according to our best philosophical ideas about cruelty?" (This is an overly broad philosophical inquiry that imposes the private judgment of philosophers on the people, without their consent.) Rather, we would ask, "is the death penalty in fact incompatible with the moral principle prohibiting cruel and unusual punishments, as the framers understood that principle, whether or not the framers would have recognized this incompatibility?" (This is a broader historical inquiry into the philosophical meaning of the moral "concepts" of the framers.)[91]

But why should we be eager to resist Dworkin's stronger claim, that we should seek a "fusion of constitutional law and moral theory"? Why should we deny that it is the job of judges to undertake the hard philosophical task of interpreting the great abstractions of our Constitution "on their own," in search of a philosophy (of equality, or justice, or whatever) that will do "most credit to the nation"? The account of liberalism presented above suggests three reasons for resisting Dworkin's project, or for resisting the tendency of contemporary legal scholarship to blur the line between legal reasoning and political philosophy. First, there is no rule of law without consent. But how can we make intelligible the claim that the people have somehow consented, much less consented according to appropriate constitutional forms, to be governed by the "better philosophy" of *A Theory of Justice*, or by any other better philosophy than the philosophy that guided their own reflection and choice at the time?[92] Dworkin's blurring of the line between law and justice depends

91. It should be noted that this is a perfectly ordinary form of moral inquiry, one that we employ whenever we ask a community to live up to its own professed moral principles, while refraining from imposing alien moral principles on an unwilling community. This is the conservative dimension of the thought of Lincoln and Douglass, discussed above. *See supra* note 62. As a strategy for legal reasoning, it largely disposes of the vexing problem of consent.

92. It is the task of Ackerman's recent work to address this serious problem of liberal theory. *See* 1 BRUCE ACKERMAN, WE THE PEOPLE (1991). That work is impressive, but it seems to me that the cleverness of his argument betrays its inadequacy: Does "consent" mean anything, if it can be achieved so readily, in the dark and almost unnoticed until the moment has long passed

on forgetting the centrality of the idea of the rule of law, and the companion idea of consent, in liberal theory.

Second, as Dworkin's reference to the "better philosophy" of Rawls suggests, the problem of "private judgment," discussed above, is insurmountable here. Even if Rawls's *A Theory of Justice* teaches the truth about justice, there can be no doubt that this is a truth beyond popular consent, as Rawls concedes in his recent work on political liberalism and the idea of an overlapping consensus.[93] Why should it matter to the legal scholar or judge that Rawls's *A Theory of Justice* is better philosophy than, say, Locke's *Two Treatises*, unless that private judgment somehow comes to be established as a public philosophy (strictly speaking, in a liberal polity, established as law)? Again, the liberal cannot abide any claim to rule that is not founded on the consent of free and equal persons. But when the private judgments of political philosophers and legal scholars ("but better philosophy is now available than the lawyers may remember") are recognized as having legal authority—when, that is, it becomes so much easier to bypass popular consent—the risk grows that doctrines that do not enjoy the genuine consent of the people will be illegitimately established in law. Put otherwise, the quest for a "fusion of constitutional law and moral theory" is founded on a hidden claim to rule made on behalf of legal scholars and political theorists.

Third, the substantive understandings of justice (or equality, or cruelty, or whatever) that are at issue here are inescapably controversial. Such controversies threaten the security that liberalism aims to protect, thus exacerbating the problems of evasion of consent and elevation of private judgment. Consider, for example, the problem of distributive justice, which is so central to contemporary liberal political theorizing—and which has lately become central to liberal legal thinking as well. The classical liberal argument counsels reticence about distributive justice. If justice requires something more than respect for the rights that are a means to peace—roughly, if "justice" means "distributive justice"—then a public life that seeks to "establish Justice" must also somehow establish certain authoritative philosophical opinions. But these opinions are matters of dispute among human beings—often angry dispute. Ideas of distributive justice are always more or less controversial, above all because they fail to acknowledge the proud sense of equality that persuades almost every citizen that no one knows better than he does what is "fitting" for him, but also because they sometimes fail to recognize the

even by those who are said to have done the consenting? For so grave a constitutional act as amending the Constitution, surely greater transparency is required on any intelligible account of consent.

93. *See* RAWLS, *supra* note 55, at 133-72.

necessity of accommodating the similarly proud sense of merit that persuades other citizens that they deserve their unequal station. And so, if liberal politics aims at peace above all, it can establish justice only by assigning to justice a simple, minimal, and uncontroversial meaning (respect for rights, performance of contracts, punishment of criminals, and the like). That is why liberal philosophers have until quite recently evaded the problem of distributive justice: This may be better philosophy than contemporary liberal philosophy. Of course, political philosophers will continue to debate the question of distributive justice. But for the philosopher, the question of civil strife, and the pride of stubborn citizens, is not at issue.[94]

Let me conclude by briefly addressing two other pathologies that might follow from blurring the line between legal reasoning and political philosophy. Some years ago, the political theorist Michael Walzer wrote an essay in *Dissent* in which he complained that the left had come to rely too heavily on the courts to be an engine of social change. As a result, he argued, the left was beginning to lose some of its formerly robust capacities for political action, which had always been one of its strengths.[95] Today, conservatives often complain as well that the willingness of the courts to strike down democratic decisions of local communities has had an enervating effect on citizenship. The price is a high one, for the rule of law is undermined where the capacities of citizens for reasonable consent are diminished. Indeed, in a growing number of cases, judges seem to be willing to reach fundamental decisions about justice that were once thought to belong to the democratic citizenry. The result has been that the reasoning of judges has an increasingly central place in our political life, and the common deliberation of citizens an increasingly marginal place. Self-government by consent is arguably on the decline.

This problem also has its roots in the confusion of legal reasoning and political theorizing that is at issue here. As questions about rights or justice are more and more often treated as legal questions, the opportunities for common deliberation about questions of political right diminish—and so too do the opportunities to educate the public mind. The result is a citizenry less capable of serious reflection about justice, and more deferential to the courts and other authorities. That is, the problem here is not so much "judicial tyranny," as conservatives sometimes call it; the danger here is increasing popular slavishness to authority, and a decline in the capacities of citizens for the sort of reasonable freedom discussed above.

94. I have elsewhere made a similar argument regarding the controversial nature of the contemporary liberal understanding of equality. *See* KAUTZ, *supra* note 8, at 68-75.

95. *See* Michael Walzer, *The Courts, the Elections, and the People*, 28 DISSENT 153 (1981).

Finally, it is notable that the debate among legal scholars and political theorists about "rights" today, between their libertarian and egalitarian defenders, often simply mirrors the contemporary political debate between conservatives and liberals. That is a problem, because it means that the appeal to rights can no longer serve as a trump or as a principled means of resolving or limiting partisan political controversies. That is, we no longer possess a nonpartisan consensus or a public philosophy of rights that transcends partisan diversity. This is in part the product of the confusion of legal reasoning and political theorizing that is at issue here. Too often, legal scholars (and even political theorists) move without much fuss from a philosophical conclusion (x is a right, according to the "better philosophy" of Rawls's *A Theory of Justice*) to a legal conclusion (x should be recognized in law as a right). But we should remind ourselves that private philosophy is not public philosophy, that the principles of justice that enjoy popular consent, on any imaginable meaning of consent, are probably not the principles of justice embraced by intellectuals and philosophers.

This is a potentially dangerous development in the law. A genuine public philosophy of rights would provide a common resource to which appeal might be made in an effort to tame partisan squabbling about secondary questions by means of appeal to agreements about fundamental principles. But if the pretense is maintained that every partisan claim has the status of a right, then we lose the possibility of such an appeal along with the habit of reminding ourselves that what unites us is more important than what divides us. Today, claims about rights are themselves almost always subject to partisan debate, and these debates are often barely disguised quarrels about interests. Compare the general consensus about freedom of speech with the partisan controversy about certain privacy rights. As Michael Walzer says, "the effort to produce a complete account of justice or a defense of equality by multiplying rights soon makes a farce of what it multiplies."[96] Too much "rights talk" trivializes the very idea of rights.[97]

V. CONCLUSION

Let me conclude by recalling the story of the two imaginary law professors with which I began. The error of the second sort of legal theorist is what we might call liberal hubris. That is, such theorists have too much confidence in liberal principles and liberal

96. MICHAEL WALZER, SPHERES OF JUSTICE at xv (1983).

97. On this issue, see KAUTZ, *supra* note 8, at 23-27, 171-79. *See also* MARY ANN GLENDON, RIGHTS TALK (1991).

institutions, and (as a consequence) too much faith in those who claim to rule on the basis of knowledge of those principles (what I have been calling "private judgment"). But it seems to me that another sort of error, almost the opposite and indeed a sort of natural companion to liberal hubris, is made by those critics of liberal principles and institutions who call for more or less fundamental transformation of the liberal constitutional order, including the forms of the rule of law, on the grounds that liberalism is at its core incoherent or corrupt—call this anti-liberal utopianism. Both philosophical tendencies can give rise to a blurring of the lines between legal reasoning and political philosophizing.

I wonder whether either philosophical posture quite does justice to the modest but real achievements of liberal polities—not that such polities can achieve justice in anything like the way that super-liberals like Dworkin might hope, but that such polities have on the whole succeeded in the more modest aim of providing for our relatively comfortable security, in a world not naturally hospitable to the aspirations of human beings, owing to certain qualities of nature and human nature. If we abandon the postures of liberal hubris and anti-liberal utopianism, then we are left with what? Not justice, which both these philosophies seek, but security (or liberty). And that is no mean achievement, as a glance around the world reminds us.

There is of course a mode of legal scholarship that suits this more modest philosophical posture. The liberal as I have described her says: "Forget justice, and attend to the law, for its own sake and not as a means to justice. It is the rule of law that enables human beings to live free, secure, and prosperous (if not quite to achieve justice)." She says: "Mind your own business—it is the most important business to be done in liberal society."